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THE KLOBUCHAR BILL: IS SOMETHING ROTTEN IN THE US ANTITRUST LEGISLATIVE REFORM?

“Every reform movement has a lunatic fringe.”

Theodore Roosevelt

An intense public debate is currently taking place in the US. The main subject of this debate is tech giants and the antitrust law reform. The fundamental dilemma is whether giant corporations, such as Apple, Google, Amazon, Microsoft, and Facebook, fit the traditional antitrust law or not. Senator Klobuchar proposed the new bill (the Competition and Antitrust Law Enforcement Reform Act) in 2021, and Congress is currently between a rock and a hard place. If Congress decides to support the New Brandeis movement and enact the bill, it could harm the tech giants and make the US start lagging behind China. If it decides otherwise, it could cause considerable dissatisfaction among US voters. This paper analyses the bill in detail and explores the possible outcomes. The conclusions suggest that enactment of the bill could have overwhelmingly adverse economic consequences for the competitiveness of US markets, innovation, and consequently for consumer welfare.

Key words: *Antitrust law. – Federal Trade Commission. – Competition and Antitrust Law Enforcement Reform Act of 2021. – Tech giants.*

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1. INTRODUCTION

On February 4, 2021, Amy Klobuchar, Senator and ardent supporter of Louis Brandeis,¹ formally introduced to Congress the Competition and Antitrust Law Enforcement Reform Act.² In her own words, this bill is “the first step to overhauling and modernizing” the antitrust law, so it can “effectively promote competition and protect American consumers”.³

This bill, along with by Klobuchar’s statement, vividly depicts a deep dissatisfaction with the current US antitrust law. Senator Klobuchar and other Neo-Brandeisians⁴ rightfully point out that many US industries have been highly concentrated, especially in the past decade. That is particularly the case in the information technology industry, where large corporations have taken over their potential rivals before becoming a real competitive threat. According to Neo-Brandeisians, these corporations with considerable market power currently fly below the US antitrust law radar most of the time (especially during mergers and acquisitions), which further leads to a decrease in consumer welfare. Additionally, that raises many concerns related to the considerable political power of large corporations and their potentially adverse influence on employment and wages, economic inequality, or innovation.

This paper will tackle these concerns and their importance for US antitrust law reform. Nevertheless, the initial hypothesis is Klobuchar’s statement that the new bill will improve the US antitrust law to “effectively promote competition and protect American consumers”. The paper aims to challenge

¹ Louis Dembitz Brandeis (1856–1941) was a lawyer and associate justice of the US Supreme Court, from 1916 to 1939. He believed that companies with significant market power harm the American economy and culture. For more details on his life, professional carrier, and legacy, see Urofsky (2005) and Berk (2009).

² The bill is fully available at: <https://www.congress.gov/> (last visited 31 January, 2022).

³ This statement is available at: <https://www.klobuchar.senate.gov> (last visited 31 January, 2022).

⁴ The New Brandeis movement emerged in the late 2010s, following Brandeis’ ideas, suggesting that concentrated market power decreases market competitiveness and consumer welfare. Some of the most prominent supporters of this movement are Lina Khan, a legal scholar, currently serving as chair of the Federal Trade Commission (FTC), Timothy Wu, a White House official with responsibility for technology and competition policy, as well as, Amy Klobuchar, a lawyer and a politician, currently serving as the US Senator. For more details on the New Brandeis movement, see Khan (2018; 2019), Begović (2018), Kraffert (2020), and Devlin (2021).

this hypothesis by analysing the bill's most significant provisions and by explaining whether their application could lead to an increase in consumer welfare.

The structure of the paper is consistent with its aim. The second section analyses the most important provisions of the new bill and juxtaposes them to the current antitrust statutes. The third section describes the hypothetical application of the bill's provisions in several actual cases involving the US tech giants to assess its potential economic consequences. The fourth section further analyses these consequences, i.e., the relationship between the number of competitors in a market and the competitive constraints and public policy concerns such as the tech giants' political power, economic inequality, and innovation. The concluding remarks will follow in the fifth section, putting the initial hypothesis to the final test.

2. NEW ANTITRUST BILL PROVISIONS

The newly proposed Competition and Antitrust Law Enforcement Reform Act does not represent a simple fine-tuning but rather a fundamental alteration to the existing US antitrust law. This is evident at first glance. In general, based on their subject matter, all new provisions may be divided into four major sections: mergers and acquisitions, monopolization, relevant market definition, and enforcement resources. Since these are the supporting pillars of the current US antitrust law, by analysing these sections of new provisions one could also in parallel identify the contours of the new emerging antitrust policy.

2.1. Revised Standard for Merger Control

The first set of new provisions relates to mergers and acquisitions. In essence, the new bill strengthens prohibitions against certain types of mergers. In particular, the Klobuchar Bill amends the Clayton Antitrust Act to forbid all acquisitions that "create an appreciable risk of materially lessening competition" instead of acquisitions where "the effect of such acquisitions may be substantially to lessen competition", as before the amendments.⁵ Moreover, the Klobuchar Bill explicitly defines the standard

⁵ Klobuchar Bill, § 4(b)(1); Section 7 of the Clayton Act (15 USC § 18).

of “materially lessening” as “more than a *de minimis* amount.”⁶ Therefore, the bill introduces higher legal standards. In other words, the FTC and the DOJ would get a valid legal ground to challenge almost any merger in the US since almost all acquisitions may generate the risk of lessening competition to “more than a *de minimis* amount.”⁷ In this way, the Klobuchar Bill sets new and stricter standards for assessing mergers and acquisitions.

Besides setting the bar (too) high, the new bill also shifts the burden of proof to the merging parties. Namely, for certain types of mergers, the proposed bill shifts the obligation from the government to the merging companies to prove that they are not in violation of the law or that the merger in question does not produce an appreciable risk of materially lessening competition. Those “specific” mergers include mergers that significantly increase market concentration, acquisitions of competitors or nascent competitors by a dominant firm, and mega-mergers valued at more than \$5 billion.⁸ In its essence, this is tailor-made provision for tech giants because it is almost impossible for any tech corporation to acquire another company without falling into the net of the shifting-burden-of-proof provision. In this way, the new bill implicitly presumes that all the large tech mergers are illegal. That effectively means that all tech giants in the US could face an insurmountable obstacle in proving that their acquisitions do not generate a risk of lessening competition to “more than a *de minimis* amount”.

Moreover, even if these large companies would settle with the antitrust authorities and provide sufficient evidence that the merger does not create an appreciable risk of materially lessening competition, they would have to comply with additional antitrust provisions. Namely, the new bill amends the HSR Act and introduces harsh post-settlement requirements,⁹ obliging the merging parties to report data to the antitrust authority during the five years following the acquisition. Among other obligations, the parties must submit a report providing information on “the pricing, availability, and quality of any product or service, or inputs thereto, in any market, that was covered by the settlement”. During the same period, it must also report on the resulting efficiencies of any divestitures or conditions established

⁶ Klobuchar Bill, § 4(b)(3).

⁷ In addition, the Klobuchar Bill clarifies that mergers may create monopsony (a market structure where buyers or employers, due to the lack of competition on the demand-side of the market, have the power to lower the prices they pay) and monopoly – not only monopoly as before the amendments.

⁸ Klobuchar Bill, § 4(b)(3).

⁹ Klobuchar Bill, § 5; Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 USC § 18a).

through the settlement. In this way, large companies in the US would be on the antitrust radar, blinking all the time, and the FTC would be provided additional time to (re)assess the mergers and acquisitions.

2.2. Revised Harmful Conduct

In addition to amending the standard for mergers and acquisitions, the Klobuchar Bill also revises the Clayton Antitrust Act standards for exclusionary conduct. In particular, the bill prohibits a firm within the relevant market from engaging in “exclusionary conduct that presents an appreciable risk of harming competition”.¹⁰ Moreover, the bill defines exclusionary conduct as “conduct that materially disadvantages an actual or potential competitor or tends to limit their ability or incentive to compete”.¹¹ In this way, the Klobuchar Bill makes a sharp U-turn and shifts the focus of antitrust law from protecting consumers to protecting competitors.

This U-turn may have multiple consequences, especially in the case of predatory pricing. Namely, consumers benefit from aggressive price competition (price war) when that does not enable a defendant to raise prices at a later time (after squeezing out competitors from the market). In that sense, the bill outlaws all practices by dominant firms that harm their actual or potential competitors, even when these practices and the established low prices are highly beneficial to consumers. In that way, the bill overturns the Supreme Court’s decisions in several landmark cases. For instance, the new provisions are contrary to the decision in the *Brooke Group case*, stating that predatory pricing implies prices “below any measure of the costs to the defendant”, which do not enable it to recoup its investment or otherwise makes “no economic sense”.¹² In other words, the price war, in general, is permitted because it increases consumer welfare.

In essence, the new exclusionary conduct provisions radically alter the existing antitrust law, overturn the relevant case law, and in some cases protect competitors instead of consumers. On top of that, the Klobuchar Bill creates an explicit presumption that exclusionary conduct presents “an appreciable risk” whenever a given company has a relevant market share of 50% or more or otherwise has significant market power.¹³ Once again – a tailor-made provision for tech giants. Due to this provision, those large

¹⁰ Klobuchar Bill, § 5; Section 7 of the Clayton Act (15 USC § 12).

¹¹ Klobuchar Bill, § 9 (a).

¹² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 US 209 (1993).

¹³ Klobuchar Bill, § 9 (c) (1).

corporations may be sued (and fined) for abuse of dominance whenever they engage in any conduct that “materially disadvantages [...] actual or potential competitors or tends to limit the ability or incentive [...] potential competitors to compete”, regardless of the consequences for consumer welfare. It seems that Senator Amy Klobuchar and other Neo-Brandeisians are not interested in economic effects of the conduct but rather in the (presumed) risk of harming competition.

To put it simply, large corporations materially disadvantaging their actual or potential competitors (or tending to limit their abilities or incentives to compete) produces appreciable risk of harming competition. The appreciable risk equals a violation of antitrust law. Therefore, large corporations materially disadvantaging their competitors must be violating antitrust law. That is a textbook example of a correct syllogism based on a false proposition.

The only way for tech giants to avoid violation of exclusionary conduct provisions, and the accompanying civil penalties,¹⁴ is to invoke the exception.¹⁵ The Klobuchar Bill provides the exception to the abovementioned syllogism “if a defendant establishes, by the preponderance of the evidence, that distinct procompetitive benefits of the exclusionary conduct in the relevant market eliminate the risk presented by the exclusionary conduct”. In other words, the new bill presumes that tech giants are harming competition (by competing in the relevant market), and it shifts the burden of proof to an undertaking to rebut this presumption. In essence, contrary to all other fields of law, case law, and common sense, the Klobuchar Bill presumes that large corporations violate the antitrust law, and these corporations must prove otherwise. Moreover, it is not enough to prove the absence of harm to competition. Large corporations (falling under Section 9 of the Bill) must prove they eliminated the risk of harming competition. In practice, that standard of proof could be the nearest equivalent to *probatio diabolica*.

2.3. Eliminated Definition of Relevant Market

The relevant market is one of the basic concepts and practical analytical tools, enabling delineation of a commerce segment within which antitrust law assesses companies’ behaviour and its consequences for consumer

¹⁴ Klobuchar Bill, 26A (f); A civil penalty, in general, is a non-criminal remedy for a law violation, and it differs from (treble) damages compensation. This legal remedy will be further analysed in the following subsection when considering the increased enforcement resources under the Klobuchar Bill.

¹⁵ Klobuchar Bill, § 9 (c) (2).

welfare (Robertson 2019). Accordingly, courts in the US require antitrust plaintiffs to prove that the challenged conduct is harmful to competition in a relevant market (Gleklen *et al.* 2021). In other words, it is almost impossible to assess whether a given behaviour harms competition and decreases consumer welfare without a properly defined relevant market. This is especially the case with large tech giant corporations, usually participating in many different (two-sided) markets. In this sense, it comes as a surprise that the Klobuchar Bill eliminates the market definition requirement.

Under the new bill, “establishing liability under the antitrust laws does not require the definition of a relevant market”.¹⁶ Definition of the relevant market is to be applied solely if it is necessary “to establish a presumption or to resolve a claim”, under provisions that explicitly refers to the terms “relevant market”, “market concentration”, and/or “market share”.¹⁷ Since Sections 1 and 2 of the Sherman Antitrust Act and Section 7 of the Clayton Antitrust Act do not contain those terms, there would be no need to define the relevant market to establish liability in the majority of antitrust cases. It seems that those terms are intentionally added solely to the sections of the new bill that shift the burden of proof from the antitrust authorities to the defendant.¹⁸ In other words, on one side, the US antitrust authorities are not obliged to define a relevant market to demonstrate a defendant’s liability in antitrust cases, while on the other side, the defendant is obliged to provide such a definition to rebut the presumption of appreciable risk or to resolve a claim.

This radical solution – practically eliminating the definition of the relevant market from the US antitrust law – would be highly unusual, to say the least. Not only would this be contrary to solutions in other well-developed antitrust systems worldwide, it would also be contrary to the established domestic case law stating that “without a definition of that market, there is no way to measure the [defendant’s] ability to lessen or destroy competition”.¹⁹ Furthermore, the suggested solution would be inconsistent with the *American Express case*, requiring consideration of competitive benefits and harms to both sides of a two-sided market,²⁰ etc.

¹⁶ Klobuchar Bill, § 13 (a).

¹⁷ *Ibid.*

¹⁸ Klobuchar Bill, § 4 (b), 26A.

¹⁹ *Walker Process Equip. v. Food Mach. & Chem.*, 382 US 172, 177 (1965).

²⁰ *Ohio v. American Express Co.*, 138 S. Ct. 2274, 585 US (2018). Also, in antitrust law theory, many authors emphasize the significance of both sides of a two-sided market when considering the competitive harms and benefits of given conduct. See, for instance, Jean-Charles, Tirole 2003; Hovenkamp 2020.

2.4. Increased Enforcement Resources

In addition to all these draconian provisions, Senator Klobuchar also proposed an increase in enforcement resources “to enable the agencies to fulfil their missions by bringing enforcement actions against the richest, most sophisticated companies in the world”,²¹ and introduction of civil penalties for antitrust law violations.

The Klobuchar Bill authorizes a significant increase in the budgets of the antitrust law enforcement agencies. These are primarily the Justice Department’ Antitrust Division, the Federal Trade Commission, and state enforcement agencies.²² That is one of the explicitly declared purposes of the new bill and the clear intention of the proponent. The only thing not so clear is why these agencies need an increased budget to “bring enforcement actions against the richest, most sophisticated companies in the world”, since the Klobuchar Bill shifts the burden of proof from the agencies to these companies and sets stricter legal standards for assessing their conduct? As already demonstrated, in most mergers and exclusionary conduct cases, these companies would have to rebut an explicit presumption of an antitrust law violation.

Besides increasing the annual budgets of existing agencies, the Klobuchar Bill would also establish new ones. The most significant would be the Office of the Competition Advocate within the Federal Trade Commission. The Office would provide recommendations concerning administrative actions that may harm or improve competition and publish reports on various topics, including “market competition and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups”.²³ Moreover, the new bill would establish a Data Centre (within the Office) responsible for preparing and publishing “in a manner that is easily accessible to the public”, a concentration database, a merger enforcement database, and other databases.²⁴ Furthermore, the bill would also establish a Division of Market Analysis, for conducting investigations of markets or industry sectors, “to analyze competitive conditions and dynamics affecting such markets or industry sectors, including the effects that market

²¹ This observation is available at: <https://www.klobuchar.senate.gov> (last visited 31 January, 2022).

²² Klobuchar Bill, § 15.

²³ Klobuchar Bill, § 8 (e).

²⁴ Klobuchar Bill, § 8 (g).

concentration, mergers and acquisitions, certain types of agreements, and other forms of business conduct have on competition, consumers, workers and innovation”.²⁵

Furthermore, the bill would authorize the FTC and the Department of Justice to commence a civil action against any market participant for violations of Sections 1 and 2 of the Sherman Antitrust Act and the new Section 26A of the Clayton Antitrust Act (prohibiting exclusionary conduct).²⁶ Under the Klobuchar Bill, these authorities may seek civil penalties (fines) for market participants up to the greater of (a) 15% of the defendant’s total prior year US revenues, or (b) 30% of the defendant’s revenues in line of commerce affected by the unlawful conduct while the conduct persisted.²⁷ Given that private plaintiffs are entitled to seek treble damages,²⁸ the new solution could result in payments many times exceeding the profits earned by anti-competitive conduct (Gleklen *et al.* 2021). These extremely high fines could deter market participants from violating the antitrust law. However, considering the thin line between legal and illegal conduct under the Klobuchar Bill, these fines could also significantly discourage market participants from pro-competitive behaviour.

The proposed substantial fines and increased enforcement resources provide irrefutable evidence of a wave of populism currently sweeping the US antitrust law. In essence, these proposals presume, without any valid ground, that large companies and industry concentration are harmful to the US economy. Moreover, the bill’s proponent seems determined to fight this “evil” by all available means and, at the same time, to achieve some other public policy goals such as the protection of demographic and socioeconomic groups, workers, and innovation.

However, before further examining populism in the US antitrust law, the proposed public policy goals, and their importance for the antitrust law reform, it is necessary to analyse more closely the possible economic consequences of the Klobuchar Bill application, because these economic consequences could enable better understanding of the declared public policy goals and whether they might be accomplished by the application of the bill or not. Of course, since the new bill has recently been introduced,

²⁵ Klobuchar Bill, § 8 (h).

²⁶ Klobuchar Bill, § 10 (b); § 26A (f).

²⁷ Klobuchar Bill, § 26A (f) (1) (2).

²⁸ 15 US Code § 15 states that “[...] any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue [...] and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee”.

the only possible option is to conduct an *ex-ante* impact assessment analysis or analyse the economic consequences in hypothetical application cases. To make these cases realistic and obtain credible results, the best way to conduct an *ex-ante* impact assessment analysis is to apply the proposed provisions to the existing antitrust cases.

3. APPLICATION OF THE NEW BILL

The application of the Klobuchar Bill to actual cases is not a simple matter of subsumption. In the first place, the tech giant antitrust cases are extremely complex and require meticulous analysis of facts before applying the law. Secondly, even if the facts of the case were evident, the new bill contains entirely new legal standards that are yet to be interpreted and specified through legal practice. Therefore, this analysis is limited only to some of the fundamental issues in the most prominent US antitrust cases. These are issues concerning exclusionary conduct in *FTC v. Microsoft* and *FTC v. Google* cases and the issue concerning mergers in the recent *FTC v. Facebook* case. Antitrust authorities handled all these cases under the current antitrust law with considerable difficulties. Nevertheless, the question is – what would have been the decisions in these cases (and their consequences for the American consumers) if the competent authorities had applied the Klobuchar Bill’s provisions?

3.1. *FTC v. Microsoft*

The FTC began an inquiry into whether Microsoft was abusing its monopoly in the PC operating system market in 1992 and ended up with a settlement on 2 November 2001.²⁹ Faced with several charges and liability under the antitrust law, Microsoft eventually proposed to share its application programming interface (API) with the competitors and appoint a panel of three independent professionals who would have access to Microsoft’s systems and records for five years, to ensure compliance (Elzinga, Evans, Nichols 2001).

Interestingly, Friedman (1999) had criticized this case at the time, claiming that it sets a dangerous precedent foreshadowing increasing government regulation in the IT industry, which may impede technological

²⁹ *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001).

progress. Bearing in mind the provisions of the Klobuchar Bill, it seems Friedman could be right after all. Namely, under that Bill, Microsoft would have had to rebut a presumption that its conduct (materially disadvantaging an actual or potential competitor or tending to limit its ability or incentive to compete) creates an appreciable risk of harming competition. In other words, Microsoft would have been liable for exclusionary conduct under the Klobuchar Bill's provisions unless it had proved otherwise.

In the highly likely case of Microsoft not being able to rebut the established presumption, the antitrust authorities would have a valid legal ground to impose remedies and civil penalties. That would probably result in the divestiture of Microsoft, as initially requested, and payment of considerable fines. In any event, Microsoft would very likely end up losing its business structure and market power, while consumers worldwide would not have the best PC operating system at the time. That could also impede technological progress because relatively small competitors could not materialize economies of scale and scope to such an extent and create the significant network effects that Microsoft did. In other words, consumers could have ended up with low-quality products and higher prices because the causality relationship between the number of competitors in a market and increased competitive constraints is usually fragile or does not exist at all (Shapiro 2018; Brayan, Hovenkamp 2020; Devlin 2021, 119–125).

3.2. *FTC v. Google*

The FTC launched an investigation into this case in 2012, following the recommendation of the US Senate Subcommittee on Antitrust, Competition Policy, and Consumers Rights.³⁰ The FTC primarily investigated whether Google had abused its dominant position by protecting the Google Search platform and gaining substantial revenue by providing advertising services. During the investigation, the FTC failed to provide strong evidence on Google's conduct that caused a decrease in consumer welfare. Eventually, in January 2013, the FTC terminated its investigation without filing a complaint,

³⁰ The initial recommendation is available at: <https://www.fairsearch.org/wp-content/uploads/2011/12/Google-FTC-Letter-12-19-11.pdf> (last visited 31 January, 2022). This case should be distinguished from the other antitrust cases against Google, including the most recent one where the DOJ filed a civil antitrust lawsuit to stop Google from allegedly unlawfully maintaining monopolies and harming competition through anticompetitive practices in the search and search advertising markets.

and Google voluntarily made a commitment to permit all rival websites to prevent Google from displaying their content and removed restrictions on the use of its advertising platform for five years (Bergqvist 2021).

Ten years later, it is evident that this case, as well as the previous one, has been initiated mainly due to political pressure and not concerns for consumer welfare. However, instead of reducing that political pressure, the Neo-Brandeisians have decided to increase it even more and propose the new bill. Under the Klobuchar Bill, the FTC would undoubtedly be more successful in taking on Google and similar companies. It would not have had to initiate an investigation, collect the evidence on the exclusionary conduct, determine the relevant market, nor provide conclusive proof of a decrease in consumer welfare. Google's liability and violation of the Competition and Antitrust Law Enforcement Reform Act would be presumed, and the company would have the opportunity to try to rebut this presumption.

Nevertheless, even in a hypothetical application of the Klobuchar Bill, it seems very likely that Google would not have been able to rebut the presumption of its liability, i.e., antitrust law violation. That is not because Google was necessarily harming competition in the relevant market, but rather because it is almost impossible to prove that it did not materially disadvantage any actual or potential competitor (or tend to limit their ability or incentive to compete). Even if it would have succeeded in proving it did not do that, it would still have to prove that its conduct does not create a *risk of harming* competition. In other words, Google could be held liable under the Klobuchar Bill even if it did not harm competition in a relevant market. The established liability could further lead to Google's divestiture, civil penalties, and possibly a somewhat lower market power and industry concentration.

3.3. FTC v. Facebook

FTC v. Facebook is the most recent tech giant antitrust case in the US. The FTC filed a complaint in December 2020,³¹ requesting a permanent injunction and other relief against Facebook to prevent the alleged anticompetitive conduct and unfair methods of competition. Within the complaint, the FTC argued that Facebook illegally maintained the personal

³¹ The timeline of the case and all the submissions are available at: <https://www.ftc.gov/enforcement/cases-proceedings/191-0134/facebook-inc-ftc-v> (last visited 31 January, 2022).

social networking monopoly through a years-long course of anticompetitive conduct. Interestingly, the anticompetitive conduct included, among others, the acquisitions of Instagram in 2012 and of WhatsApp in 2014, which were both previously assessed and approved by the FTC (Begović, Ilić 2021).

Under the new Klobuchar Bill, Facebook could have been liable for the antitrust law violation on (at least) two different grounds. First, Facebook's exclusionary conduct (materially disadvantaging an actual or potential competitor or tending to limit its ability or incentive to compete) could generate an appreciable risk of harming competition unless Facebook proved otherwise.³² The application of these provisions and the corresponding establishing-liability mechanism would be almost the same as in the mentioned cases of Microsoft and Google. Secondly, Facebook's acquisitions of Instagram and WhatsApp would not have been approved due to the presumed appreciable risk of lessening competition.

Namely, if the Klobuchar Bill had been applicable at the time of Facebook acquiring its up-and-coming rivals Instagram and WhatsApp, these acquisitions would most likely have been prohibited. As already mentioned, the bill forbids acquisitions that "create an appreciable risk of materially lessening competition" or risk of lessening competition for "more than a de minimis amount".³³ Moreover, the bill presumes that all acquisitions of competitors or nascent competitors by a dominant company automatically create the risk lessening competition, i.e., that these mergers are illegal *per se* unless the merging parties prove otherwise.³⁴

Therefore, under the new bill, Facebook could have acquired Instagram and WhatsApp only upon proving that these mergers would not have created the risk of lessening competition "more than a de minimis amount". Similar to the mentioned exclusionary conduct standard, it would not be relevant whether these mergers were harmful to competition and consumer welfare, but whether they create the (presumed) risk of harming competition, which is an extremely high standard to meet. Moreover, to rebut this presumption, Facebook would have to define a relevant market (even though the FTC itself failed to do so successfully in the most recent case,³⁵ and under the new bill it would not have to). Finally, even if Facebook, under the heavy burden

³² Klobuchar Bill, § 9.

³³ Klobuchar Bill, § 4.

³⁴ Klobuchar Bill, § 4.

³⁵ For more details on the definition of the relevant market in *FTC v. Facebook* case see Begović, Ilić (2021).

of proof, were to settle, the FTC could oblige Facebook to report data on its business during the next five years to (re)assess “the competitive impact of the acquisition”.³⁶

Based on the Facebook example, it seems evident that under the new bill tech giants would face practically insurmountable obstacles if they would try to acquire their actual or potential competitors. The Klobuchar Bill set the revised standards for clearing mergers and acquisitions so high it is hard even to imagine a hypothetical example of a tech giant acquiring any company without also violating antitrust law.

4. NEW COMPETITION POLICY AND ITS ECONOMIC CONSEQUENCES

The newly emerging competition policy in the US is shaped under the strong influence of the New Brandeis movement and it is to be implemented through a set of bills, including the Competition and Antitrust Law Enforcement Reform Act as the crucial one. Therefore, to analyse in detail the possible economic consequences of the new competition policy and the new bill, it is necessary to explain the policy’s origins and its content in the first place.

The New Brandeis movement consists primarily of academics and stakeholders, whose fundamental idea is that tech giants, industry concentration, and market power are harmful to consumers and the US economy. One could find many academic papers claiming that level of competition in the US has plummeted and that the antitrust law enforcement in the country is too lax (Baker 2019; Philippon 2019). Most of these papers single out tech giants, including Google and Facebook, as the main culprits of the competition decline and ineffectiveness of the US antitrust law. Moreover, Autor *et al.* (2017), Basu (2019), Locker, and Eeckhour (2019), claim that the increased industrial concentration, along with a considerable increase in profit margin, and the share of capital in the national income distribution, is a clear signal of raising market power and decreasing competition in the US market. Accordingly, these authors advocate significant amendments to the antitrust law, more vigorous law enforcement, and reconsidering the well-established antitrust policy aims.

³⁶ Klobuchar Bill, § 5.

Besides academics, the most relevant stakeholders are (populist) politicians. Some of them previously had an academic career, like Lina Khan, a 31-year-old legal scholar, recently appointed FTC Chair by US President Biden. The President also promoted Timothy Wu, who strongly advocated filing the antitrust lawsuit and breaking-up Facebook in 2010, as the White House official responsible for technology and competition policy. In addition to the executive branch power, the New Brandeis movement also has many ardent supporters in Congress, including Senator Klobuchar, who formally proposed the Competition and Antitrust Law Enforcement Reform Act aiming to “overhaul and modernize” antitrust law.

According to these academics and politicians, the main goal of the newly emerging competition policy (and the new bill) is to decrease the market power of tech giants and the level of industry concentration while increasing competition in the US markets. Furthermore, some Neo-Brandeisians claim that the new competition policy should address the main concerns related to the political power of tech giants and certain public policy goals, such as fostering innovation, increasing employment rate, and decreasing economic inequality. To achieve all these policy goals, the New Brandeis movement suggests a radical reform of US antitrust law, which, among other things, implies enactment of the Competition and Antitrust Law Enforcement Reform Act.

It is important to emphasize that Neo-Brandeisians blame current US antitrust law and large corporations for the increased market power and industry concentration for many years now. Also, over the years they have persistently claimed that market power and industry concentration are inextricably intertwined with the core social problems, such as median-wage stagnation and increasing economic inequality, sluggish pace of innovation, slow productivity growth, etc. In other words, Neo-Brandeisians have gradually shaped the current public opinion in the US on large corporations and their role in the American economy. According to this opinion, the new competition policy and antitrust law reforms could be a universal solution for some of the burning problems in the US economy. It seems that a considerable majority of the US voters share this opinion and strongly supports suggested reforms. Therefore, it would be reasonable to assume that politicians could cause considerable dissatisfaction among US voters if they do not enact the Klobuchar Bill.

So far, it seems everything is going smoothly for the New Brandeis movement and its supporters. On 20 January 2022 the Senate Judiciary Committee voted 16 to 6, on a bipartisan basis, to advance the Klobuchar Bill and set it on a path to be adopted by the full Senate (Feiner 2022; MacCarthy 2022). Due to analysis in this paper, the enactment and application of the

bill would put US tech giants and other large companies in an unenviable position. The original intentions behind the Klobuchar Bill and the possible consequences of its application are already explained. Yet, Neo-Brandeisians should, at some point, answer the three fundamental questions: Is market power harmful to consumers? Does market power correlate with industry concentration? Does industry concentration correlate with competitive constraints? So far, it seems that the Neo-Brandeisians presume the affirmative answers to these three questions in the same way as they presume that tech giants violate the antitrust law – without any valid evidence.

Nonetheless, the debate concerning industrial concentration in the US economy is far from settled. For instance, Shapiro (2018) explains in detail that industrial concentration does not imply market concentration, while Brayan and Hovenkamp (2020) further argues that even relevant market concentration is not an indicator of competition in that market. In other words, they suggest that, while market power could be harmful to the US consumers, it could also be beneficial due to the increased dynamic market efficiency, i.e., innovation fostering. At the same time, the level of industry concentration does not say a lot about market concentration because tech giants from one industry may participate in different relevant markets. Moreover, market concentration could be beneficial, i.e., it could significantly increase competitiveness due to the materialization of economies of scale and scope, innovative products and services, or simply – increased productivity. Therefore, the three fundamental questions raised above do not have binary answers. The increased market power and industry concentration may at the same time be both beneficial and harmful for the US economy, depending on the evaluation criteria and specific features of the case. On one side, if the criterion is consumer welfare – a well-defined standard (Crane 2019, 769) that was initially associated with Bork (1978) – the current antitrust law seems like a sound basis that could be polished further (Devlin 2021, 135).³⁷ On the other side, if the evaluation criterion were to be company size, i.e., market power, political power, employment and wages, inequality, or any similar goal (Steinbaum, Stucke 2020; Eeckhout 2021), then the attempted radical reform of the antitrust law could be necessary. However, it is not that difficult to answer the question of whether antitrust law is the right tool for achieving all these different goals. One may achieve all these goals (if needed) through taxation, regulation, and many other ways, without significantly lessening incentives for tech giants and other market participants to

³⁷ For instance, Gilbert (2020, 2–4) suggests further amending antitrust law to foster innovation while keeping consumer welfare maximization as the main criterion; Crane (2019, 760) also notes that there is “not an obvious replacement in sight” for the consumer welfare standard.

compete. Also, Gilbert (2020, 235) states that, among other deficiencies, “these ill-defined goals [increase] the risk that courts and antitrust agencies will have too much discretion to respond to political pressures, corporate lobbying, and personal biases”. On top of that, the introduction of brand-new legal standards and concepts could significantly raise the overall cost of regulation and create considerable uncertainty for market participants.

Even if Congress enacts the Klobuchar Bill and the tech giants refrain from materially disadvantaging competitors and acquiring nascent firms, it will not automatically translate into the accomplishment of the populist political goals, such as a decrease in the tech giants’ market and political power. On the contrary, market power and prices could increase due to the many small companies that do not feel competitive pressure from tech giants and cannot materialize economies of scale and scope or create considerable network effects. Also, the fact that these small companies do not have significant political power individually does not mean they will not form well-organized interest groups to protect these economic inefficiencies. Furthermore, diversified technological progress is not a guarantee for the productive efficiency of small firms and competitiveness at the global level. It is more likely that the most sophisticated and innovative technical solutions in the US would come from abroad, where tech giants still can materialize economies of scale and scope, create network effects, be more productive and invest more in research and development. In other words, the Klobuchar Bill and the newly emerging antitrust policy may make the US start lagging behind China and other countries because small companies and restricted tech giants cannot outperform Huawei and similar global competitors. Moreover, if American tech giant companies fall behind competitors from other countries once, they would have great difficulty catching up and becoming competitive globally. That is a sound reason for Congress to be extremely cautious when considering the Klobuchar Bill and other similar amendments to the current antitrust law that would imply significant deviations from the safe course.

5. CONCLUDING REMARKS

The Klobuchar Bill, if enacted, could radically reform the US antitrust law that has been enforced and meticulously developed over the past two centuries. In the first place, it could greatly revise legal standards for mergers and acquisitions and exclusionary conduct. Those standards, in conjunction with the proposed civil penalties and shifted burden of proof, i.e., presumed

antitrust law violations, could strongly disincentivize the US tech giants and other large companies to improve their business and increase consumer welfare.

The hypothetical application of the new bill to the facts of some of the solved and ongoing cases confirms this conclusion. In all analysed cases, tech giants would be liable for antitrust law violations under the Klobuchar Bill. For instance, under the new statute, it could be illegal to commence a price war or acquire a nascent innovative competitor, even when that is highly beneficial for consumers. In that sense, the new statute would probably reduce the industry concentration and market power. However, that would not automatically mean that consumers and the US economy would be better off. On the contrary, a significant reduction in industry concentration and market power could cause a decrease in consumer welfare because relatively small companies would not materialise economies of scale and scope nor create considerable network effects. In that way, due to the enactment of the Klobuchar Bill, the US consumers may end up paying higher prices for lower quality goods, and the US economy, in the long run, may start lagging behind China and other developed countries.

Due to these findings, this paper cannot confirm the initial hypothesis that the enactment of the new bill will improve the US antitrust law to “effectively promote competition and protect American consumers”. On the contrary, the Klobuchar Bill effectively supports the reduction of market power and market concentration (and accomplishment of other populist public policy goals), even when that decreases consumer welfare, i.e., harms American consumers. Moreover, it seems that using standard antitrust policy as a tool for accomplishing populist goals could be even more harmful to the US economy than market power and industrial concentration.

All the findings in this paper, including the rejection of the constructed hypothesis, suggest that one should be extremely cautious when considering radical amendments to the current antitrust law and deviating from the well-established consumer welfare standard.

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